RECENT CASES

AGENCY—TORTS—RECEIVERS—The plaintiff was injured as the result of a defective sidewalk on premises belonging to the defendant company, but under the direct management of its receiver. Recovery was refused on the principle that a receiver is an officer of the court and not the agent of him whose property he holds. Carlow v. City Savings Bank, 137 N. W. Rep. 852 (Neb., 1912).

A receiver is an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation, *pendente lite*, when it does not seem reasonable for either party to hold it. He is not the agent or representative of either party to the action, but is uniformly regarded as the officer of the court. Williamson v. Lehman-Durr Co., 136 Ala. 467 (1902). This definition shows the usual construction given to the position of a receiver in American courts. An exception is made to the general doctrine that a receiver is not an agent where it is the party surrendering the property who asks for his appointment. Under such conditions, the receiver may be held to be the agent of the owner of the property. Texas & Pacific R. R. v. Gay, 26 S. W. Rep. 599 (Tex., 1983). The distinction is made on the ground that in the one case the owner is compelled to surrender his property, while in the other it is an entirely voluntary act. Another exception is made in Louisiana, where, if members of a partnership ask for the appointment of a receiver to wind up the partnership affairs, he is held their agent, his appointment being considered the act of the parties rather than the act of the court. Kellar v. Williams, 3 Rob. 321 (La., 1843).

In England, the receiver, when appointed by the court is not looked upon so much as a servant of the court, but as a principal conducting a business by order of the court. Consequently he is unlimitedly liable in the conduct of the business unless such personal liability has been excluded by so stating at the commencement of the receivership or by so inferring from the surrounding circumstances. *Re* Glasdis Copper Mines, (1906) 1 Cr. 365; but a receiver who carries on a business for the benefit of mortgagees has been held their agent. Whimrey v. Moss Steamship Co. Limited, 2 K. B. 813 (1910). Where power of appointment of a receiver had been granted in the mortgage deed to trustees, the receiver was held the agent of mortgagor. Gosling v. Gaskill, (1897) A. C. 575.

BANKS AND BANKING—FOLLOWING TRUST FUNDS—The A bank, when insolvent, borrowed money from the B bank on false representations which amounted to fraud. It used the money in the ordinary course of business in paying checks. In an action by the B bank to follow the money loaned as a trust fund in the hands of the receiver of the A bank, it was held that the B bank had no prior claim before the other creditors, since the money could not be traced into specific property or funds. Bellevue State Bank v. Coffin, 125 Pac. Rep. 816 (Idaho, 1912).

The weight of authority is that when deposits are received by a bank, known by its officers to be insolvent, the title to the money passes to the bank, but such receipt of money, being a fraud on the depositor, renders the bank or its assignee a trustee *ex maleficio* and the deposit a trust fund, recoverable by the depositor. Cragie v. Hadley, 99 N. Y. 131 (1885); Corn, etc. Bank v. Solicitors' Co., 188 Pa. 330 (1898). Like any other trust fund, if it can be traced and is capable of identification, it may be recovered from an assignee of the insolvent bank. If it is a deposit of a check or draft, remaining uncollected in the hands of the receiver, it may be reclaimed. First Nat. Bank v. Strauss, 66 Miss. 479 (1888). If it has been collected, the proceeds form a trust fund recoverable from the receiver of the bank. Higgins v. Hayden, 53 Neb. 61 (1897). If the money has been invested, the *cestui que trust* may fix the character of the original fund on the property. Burnham v. Barth, 89 Wis. 362 (1894).

Where the bank has mingled such funds with the mass of its other funds, the question arises as to what identification of the trust fund is necessary, on

which point there is great conflict of authority. The early English cases held that money having no earmarks was incapable of identification when mingled with other funds. Deg v. Deg, 2 P. Wms. 414 (1727). But it is now well settled in England and this country that there need be no identification of the identical coins, and the mere fact that there has been a mingling with other coins is not of itself sufficient to bar recovery by the *cestui que trust*. Knatchbill v. Hallett, L. R. 13 Ch. Div. 696 (1880); Plano Mfg. Co. v. Auld, 14 S. Dak. 512 (1901). There is, however, a line of cases taking the opposite view. Union Nat. Bank v. Goetz, 138 Ill. 127 (1891); Higgins v. Hayden, 53 Neb. 61 (1897).

By the great weight of authority, the assets of the insolvent bank must have been actually augmented to the extent of such a trust fund. The trust fund must be traced into the bank's assets, and it must be shown to have reached the receiver. Board v. Wilkinson, 119 Mich. 655 (1899); State v. Foster, 5 Wyo. 199 (1894). If the transaction however amounted to no more than an exchange of creditors, the mere cancelling of one liability and assumption of another, or, if the money was used in the discharge of indebtedness, the assets have not been increased thereby. Insurance Co. v. Caldwell, Kan. 156 (1898).

COMBINATIONS IN RESTRAINT OF TRADE—SALES AGREEMENTS—Yearly agreements were made between a combination composed of independent firms engaged in the sugar refining business and their customers, whereby ten cents per hundred weight was to be returned to the customer provided he dealt exclusively with the combination during the next succeeding year. A purchaser sought to avoid payment on the ground that he was dealing with a combination in restraint of trade. Inasmuch as the contract itself was not in restraint of trade, the seller was allowed to recover the purchase price. Wilder Mfg. Co. v. Corn Products Refining Co., 75 S. E. Rep. 918 (Ga., 1912).

The doctrine of the principle case is well recognized in prosecutions under the Act of July 2d, 1890, c. 647. It is no defence to recovery for the price of goods that the seller is an illegal combination in restraint of trade. Harrison v. Glucose Refining Co., 116 Fed. 304 (1902), but where the contract of sale is part of the illegal scheme to restrain trade, the purchase price of the goods cannot be recovered. Conelly v. Union Sewer Pipe Line Co., 184 U. S. 540 (1901). Mere granting of rebates in return for exclusive trade during a limited period is not in itself such a scheme to restrain trade. *In re* Corning, 51 Fed. 205 (1893); *In re* Greene, 52 Fed. 105 (1893). Yet if the contract itself is illegal the buyer may not retain the goods and recover the price. Empire Distilling Co. v. McNulta, 77 Fed. 700 (1897).

Where the purchaser who dealt with a corporation was given low profitable rates in return for exclusive trade and prices were made prohibitive, for a purchaser who did not deal exclusively with the corporation, there was no violation of the statute. Whitewell v. Continental Tobacco Co., 125 Fed. 454 (1904). Nor was there a violation in granting an exclusive right to sell the products of a manufacturer, Virtue v. Creamery Package Co., 179 Fed. 115 (1910), nor in an agreement not to ship any of the purchased products out of a certain state, Phillips v. Solon Portland Cement Co., 125 Fed. 593 (1903). But there is a violation when jobbers purchasing from a corporation agree to resell only at a certain price, Continental Wall Paper Co. v. Voight, 212 U. S. 227 (1909), and where a combination of manufacturers agree not to sell to another who is in debt to any one of them. Fred Heim Brewing Co. v. Belinder, 71 S. W. Rep. 691 (Mo., 1902).

CONTRACTS—ILLEGALITY—In a suit on notes by indorsee against maker, the defense that the notes were given to the payee for a purpose in violation of a Federal statute, and that the indorsee had notice of this when he took the notes, was held good. Bank v. Smith, 125 Pac. Rep. 632 (N. M., 1912).

This merely follows the well-settled rule that an executory contract founded upon illegal considerations can not be enforced. Wood v. Wood's Est., 69 Pac. Rep. 981 (Cal., 1902); Wilerx v. Brayzos, 74 Conn. 208 (1901); McMulta v. Bank, 45 N. E. Rep. 954 (Ill., 1897). And if the contract is executed, the court will not relieve the party from loss by having performed it. Richardson v. Buhr, 77 Mich. 632 (1889). Neither will equity enforce it or relieve the parties.

Jones v. Redman, 5 Ky. Law Rep. 767 (1884); Bleasdell v. Fowle, 120 Mass. 447 (1876). The law leaves the parties where it finds them, not for the sake of the party deriving the benefit, but for the law's sake and that only. Attaway v. Bank, 5 S. W. Rep. 16 (Mo., 1887).

So the party already benefited will not be estopped from asserting the illegality of the consideration, for the courts will not permit, directly or indirectly, an action to be maintained where it is necessary to have recourse to such a contract. McMullen v. Hoffman, 174 U. S. 639 (1899), limiting Brooks v. Martin, 2 Wall. 70 (U. S., 1863).

It is immaterial whether the offense was *malum prohibitum* or *malum in se.* Haggerty v. St. Louis Ice Co., 143 Mo. 238 (1898).

CONTRACTS—PENALTY OR LIQUIDATED DAMAGES—Where a contract was entered into for the purchase of a grain elevator and flouring mill for $12,500 and the seller further agreed not to re-engage in business for five years "under penalty of $6,200 as liquidated damages," such contract must be regarded as providing a penalty and not liquidated damages. Mount Airy Milling & Grain Co. v. Runkles, 84 Atl. Rep. 533 (Md., 1912).

Whether an amount stated in a contract is to be regarded as a penalty or as liquidated damages is not controlled, or indeed necessarily affected, by the employment of either or both of these terms. Hoagland v. Segur, 38 N. J. L. 236 (1876); Bagley v. Peddie, 16 N. Y. 469 (1857); Sheve v. Brereton, 51 Pa. 175 (1865); Davis v. Freeman, 10 Mich. 188 (1862).

Regard must be had to the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and its surroundings, the ease or difficulty of measuring the breach in damages and the sum stipulated. Clements v. Schuylkill River E. S. R. Co., 132 Pa. 445 (1890).

Even where the parties expressly stipulate in the recitals of the contract that the sum mentioned shall be regarded as liquidated damages and not as a penalty, or where any other language equally conclusive has been used, the courts will still hold the question to depend upon the meaning and intent of the parties as gathered from a full view of the provisions of the contract, the terms used to express such intent and the peculiar circumstance of the subject matter of the agreement. Perkins v. Lyman, 11 Mass. 76 (1814); Chase v. Allan, 79 Mass. 42 (1859); Dakin v. Williams, 17 Wend. 447 (N. Y., 1837); Streeper v. Williams, 48 Pa. 450 (1865).

The tendency and preference of the law is to regard a sum stated to be payable if a contract is not fulfilled as a penalty and not as liquidated damages. Yet courts endeavor to learn from the subject matter of the contract, the nature of the stipulations, and the surrounding circumstances, what was the real intent of the parties, and are governed by such intent. Cushing v. Drew, 97 Mass. 445 (1867).

To determine whether the sum named is intended as a penalty or as liquidated damages, it is necessary to look to the whole instrument, its subject matter, the ease or difficulty of measuring the breach in damages, and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach. Burrill v. Daggett, 77 Me. 545 (1885).

COURTS—ABSENCE OF JUDGE DURING THE TRIAL—The judge in a criminal case, with the consent of both parties, absented himself from the court-room during a part of the prosecutor's argument, in order to prepare his charge, but it was held that such absence was not ground for reversal unless the accused was prejudiced by the absence. Hughes v. State, 149 S. W. Rep. 173 (Tex., 1912).

In a legal sense the judge of a court is the court and there can be no court without a judge. Pressley v. Lamb, 105 Ind. 171 (1885); and in felony cases, his presence is essential to the organization of the court. O'Brien v. People, 17 Colo. 561 (1892). The judge should be present during all the stages of the trial. Horne v. Rogers, 110 Ga. 362 (1900). If it becomes necessary for him to be temporarily absent, he should suspend the proceedings until his return. Well v. O'Hare, 209 Ill. 627 (1904). His absence during the examination of a witness or the ar-

gument of counsel, or at the handing in of the verdict, is reversible error. People v. Blackman, 127 Cal. 248 (1899); Stokes v. State, 71 S. W. Rep. 248 (Ark., 1902). But his absence is not reversible error, where he is still within hearing of the argument or evidence, and where he is in a position to pass on any question which may arise therein, so that nothing prejudicial may result. Schintz v. People, 178 Ill. 320 (1899); Rowe v. People, 26 Colo. 542 (1899). A temporary absence of the judge during argument may be waived, and the defendant will be bound by such waiver in the absence of any prejudice to him. State v. Hammer, 116 Iowa 284 (1902).

According to the weight of authority, in the prosecution of felonies, the presence of the judge at all stages of the trial is absolutely essential to its validity, and his absence from the trial for a considerable length of time without suspending proceedings will vitiate the trial and is reversible error. Ellerbe v. State, 75 Miss. 522 (1897). In the case of misdemeanors, it has been held that the judge may give place to another by consent, and if he does so without objection in advance, consent will be presumed. Ellerbe v. State, 75 Miss. 522 (1897); Turbeville v. State, 56 Miss. 763 (1879). In civil trials, the absence of the judge without consent is reversible error in some states. Smith v. Sherwood, 95 Wis. 558 (1897). When, however, no objection is made, it will not generally be reversible; in order to get a new trial, objection must not only be made, but his absence must be prejudicial. De Houghnes v. Western Co., 84 S. W. Rep. 1066 (Tex., 1905).

CRIMES—ASSAULT AND BATTERY—BURDEN OF PROOF—On an indictment for assault with a deadly weapon, the prosecution has made out a *prima facie* case when it proves that the defendent pointed a cocked pistol at the prosecutor and advanced toward him in a threatening manner. The fact that the gun was unloaded (if such is the fact) is a matter of defence. Territory v. Gomez, 125 Pac. Rep. 702 (Ariz., 1912).

In another recent case, State v. Yturaspe, 125 Pac. Rep. 802 (Idaho, 1912) where the defendant was indicted for assault with a deadly weapon the court held that there must be intent and a present ability to perpetrate the battery and therefore the jury must believe beyond a reasonable doubt that the gun was loaded.

On the main point, that there can be no assault with a deadly weapon in pointing an unloaded gun at another, the two cases mentioned above are in accord with each other and the majority of jurisdictions. Regina v. James, 1 Car & K. 529 (Eng., 1844); Regina v. Baker, 1 Car & K. 253 (Eng., 1843); State v. Godfrey, 17 Ore. 300 (1889); People v. Wells, 145 Cal. 138 (1905); State v. Sears, 86 Mo. 169 (1885); Chapman v. State; 78 Ala. 463 (1885). These cases show that, unlike the civil action, the test is not the unlawfully putting another in fear. People v. Lilley, 43 Mich. 525 (1880); although on the other hand this was held the test in State v. Shepherd, 10 Iowa 126 (1859) and in State v. Mitchell, 139 Iowa 455 (1908). In State v. Atkinson, 141 N. C. 734 (1906), it was held assault with a deadly weapon even though the gun was unloaded

The two principle cases differ from each other on the question as to who shall assume the burden of proof. Jurisdictions differ in the same manner some holding the state must prove the weapon was loaded, People v. Jacobs, 29 Cal. 579 (1866); State v. Napper, 6 Nev. 113 (1870); and others holding that where all the circumstances are such as would exist if one were using a loaded gun, directions to acquit would be error and the fact that the gun was unloaded (if such be the fact) is a matter of defence. State v. Herron, 12 Mont. 230 (1892); Crow v. State, 41 Tex. 468 (1874).

CRIMES—INVOLUNTARY MANSLAUGHTER—AUTOMOBILES—Defendant was indicted and convicted of involuntary manslaughter under a statute which undertakes to make penal the operation of an automobile on the highway at a rate of speed greater than is reasonable and proper, and upon approaching a crossing of intersecting highways, at a speed greater than six miles per hour. The court held that so much of the statute which related to driving at an unreasonable speed was too indefinite in its terms to be capable of enforcement, and therefore void, but the convictions would be upheld on the count for approaching a cross-

ing at a speed greater than six miles per hour. Hayes v. State, 75 S. E. Rep. 523 (Ga., 1912).

This decision is novel in that all the states have passed similar statutes, and municipalities, ordinances, regulating the speed of motors and from this decision it would seem unsafe for the prosecution not to include counts for the common law offense. But the better view of the statute is expressed in Schultz v. State, 130 N. W. Rep. 972 (Neb., 1911), where a conviction under a similar statute was sustained, holding that the indictment did charge a crime and the statute was not void for unreasonableness. *Accord:* State v. Watson, 216 Mo. 420 (1909).

The offense would have been manslaughter at common law, for one who with reckless disregard for the safety of others so negligently drives an auto in a public street as to cause the death of another is guilty of criminal homicide. State v. Campbell, 82 Conn. 671 (1909). An indictment under a statute making it penal "to ride or drive faster than *a common traveling pace,*" was held sufficiently definite to charge a crime in State v. Smith, 29 R. I. 439 (1908).

CRIMES—WILFUL TRESPASS AS A CRIME IN PENNSYLVANIA—Several persons having been convicted and committed to a county jail for wilful trespass upon posted land under the Act of April 14, 1905, Pa. P. L. 169, were summarily released by the sheriff. In a criminal prosecution of the sheriff under the Act of March 31, 1860, Pa. P. L. 382, the majority of the court held wilful trespass upon posted land to be a public offense or crime within the meaning of the Act of 1860 and that the conviction of the sheriff was therefore legal. Com. v. Shields, 50 Pa. Super. Ct. 194 (1912).

At common law trespass, without more, upon realty was not a crime but a purely civil injury on account of which an action for damages lay. Worrall v. Rhoads, 2 Whart. 427 (Pa., 1837). But the Act of 1905 now declares this a public wrong, subject to a penalty. Although in Com. v. Lapempti, 16 Pa. D. R. 403 (1906), a storekeeper who went upon such posted land to collect bills due him from tenants residing thereon, was held liable, yet a storekeeper who delivers goods previously ordered to such tenants, having their implied invitation, is not a trespasser within the Act. Com. v. Burford, 38 Pa. Super. Ct. 201 (1909), affirmed in 225 Pa. 93 (1909). But if he go beyond such implied invitation and solicit orders from those to whom he does not deliver at the time, he is a trespasser to that extent. Com. v. Shapiro, 41 Pa. Super. Ct. 96 (1909). Nor does the Act of May 29, 1901, Pa. P. L. 302, providing that "public fishing shall exist" in navigable streams, give the public a right to fish in a creek the bed of which is privately owned and posted according to the Act of 1905. Com. v. Foster, 36 Pa. Super. Ct. 433 (1908). Although a penal proceeding, it has been held not reversible error to bring the proceeding in the name of the prosecutor instead of the Commonwealth to the use of the school district. Tewsbury v. Miller, 9 Lack. Jur. 262 (Pa., 1908). The trespass, however, must be wilful; not every common law trespass will warrant a conviction, as Com. v. Burford, *supra;* Com. v. Fluck, 7 Just. L. R. (Somerset Co., Pa., 1908).

FRAUD ON MARITAL RIGHTS OF A WIFE—In Allen v. Allen, 99 N. E. Rep. 462 (Mass., 1912), the defendant had taken a conveyance of property from a relative, in consideration of a bond for support. The relative was then being sued for breach of promise of marriage, and shortly afterward married the complainant in that suit. He represented to her that he still held the property; which partly induced the marriage. It was held that, as there was no agreement of marriage when the conveyance was made, it was not in fraud of her marital rights, and that where, as here, there was a valid consideration, she must show both fraudulent intent of the grantor and knowledge by the grantee.

The general rule in America is that a voluntary ante-nuptial conveyance by a husband is in fraud of his wife's marital rights and void. Murray v. Murray, 115 Cal. 266 (1896); Beere v. Beere, 79 Ia. 555 (1890); Smith v. Smith, 6 N. J. L. 515 (1847); Thayer v. Wheelock, 14 Vt. 107 (1842); Baird v. Stearne, 15 Phila. 339 (Pa., 1882); Youngs v. Carter, 50 How. Prac. 410 (N. Y., 1875). Even though in pursuance of a previously formed intent which was not disclosed.

Brown v. Bronson, 35 Mich. 415 (1877). And though the husband could have defeated the wife's right of homestead by moving. Arnegaard v. Arnegaard, 7 N. D. 475 (1898).

But the marriage must have been contemplated, Tate v. Tate, 18 N. C. 22 (1834); Gainor v. Gainor, 26 Ia. 337 (1868). And there must have been an intention to defraud the wife. Ross's Appeal, 127 Pa. 4 (1889). However, a reasonable provision for children by another wife is not a fraud on marital rights, where there is ample provision made for the present wife. Ross's Appeal *supra;* Kinne v. Webb, 54 Fed. 64 (1893); Alkire v. Alkire, 134 Ind. 350 (1892).

Statutes regulating the property rights of husband and wife have weakened the rule as to fraud on marital rights. Kerr on Fraud and Mistake, 4th ed., p. 288; Brinkley v. Brinkley, 128 N. C. 503 (1901); Butler v. Butler, 21 Kans. 521 (1879).

Property so conveyed will not be followed into the hands of a *bona fide* purchaser. Chandler v. Hollingsworth, 3 Del. Chan. 120 (1867). This last case contains an excellent outline of the law upon the subject, in England and America.

FRAUDULENT CONVEYANCES—GRANTEE'S LIABILITY FOR RENT—Tate v. Saunders, 149 S. W. Rep. 485 (Mo., 1912), was a dispute as to a building restriction. The owner of the restricted premises fraudulently conveyed them, to avoid paying the judgment for damages about to be given against him. In an opinion holding the conveyance void the court decided that the fraudulent grantee could not be held accountable to the judgment creditor for rents accruing before the execution sale under the judgment against the grantor.

This is in accord with the better considered cases. A judgment creditor has no interest in the land other than to sell it. Freeman on Judgments, § 338; and can only claim the proceeds of land after it has been sold on his execution. Conard v. Atlantic Co., 1 Pet. 443 (1828). Where there is no secret trust in favor of the grantor, and the property is subject to execution, the fraudulent grantee is not accountable for prior rent. Warner v. Blakeman, *43 N. Y. 487 (1868); Stout v. Phillipi, 41 W. Va. 339 (1895); Robinson v. Stewart, 10 N. Y. 189 (1854); Ringgold v. Waggoner, 14 Ark. 69 (1853); Higgins v. York, 2 Atkyns 107 (1740); Jacobs v. Smith, 89 Mo. 673 (1886); State v. McBride, 81 Mo. 349 (1883). *Contra:* Kitchell v. Jackson, 71 Ala. 557 (1882); Parr v. Saunders, 11 S. E. Rep. 979 (Va., 1880); Booth v. Wiley, 102 Ills. 84 (1881). Where there is a secret trust, the fraudulent grantee is bound for all rents and profits as he merely represents the debtor. Marshall v. Croom, 60 Ala. 132 (1877); Strikes Case, 1 Bland. 57 (Md., 1817).

A creditor may compel a fraudulent grantee to account for rents accruing after the death of the fraudulent grantor, where there is no property in the estate. Jones v. McCleod, 61 Ga. 602 (1878); or after the bankruptcy of the fraudulent grantor. Sands v. Codwise, 4 Johns. 536 (N. Y., 1808); or from the time a court of equity sequestrates the property. Flaherty v. Stephenson, 56 W. Va. 192 (1904). The trustee of an insolvent may have an accounting for rent due after the estate vests in him. Kipp v. Hanna, 2 Bland. 26 (Md., 1820).

The rule of the foregoing cases seems to be that a grantee in fraud of creditors is liable only for rents and profits accruing after his claim of title in himself has in some way been defeated.

HIGHWAYS—LIABILITIES FOR INJURIES—PERSONAL LIABILITY OF OFFICIALS—Smith v. Zimmer, 125 Pac. Rep. 424 (Mont., 1912), recognizes, but limits rigidly, the right of recovery of one injured through a defect in a highway, by requiring that the commissioners must have actual notice of the defective condition laid before them at a formal meeting of the Board, inasmuch as what comes to their individual notice can not be charged against them as official knowledge. The decision is based on Daniels v. Hathaway, 65 Vt. 247 (1892), but that case, in view of its peculiar facts, can hardly be said to be an authority on the question of the liability of officers primarily charged with maintenance of highways.

In American jurisdictions the broad right of recovery in favor of travelers injured through defects in highways is recognized as against officers charged

with proper maintenance thereof, and having at their command instrumentalities to raise the requisite funds. Tearney v. Smith, 86 Ill. 392 (1877); War n v. Clement, 24 Hun. 472 (N. Y., 1881). This right is founded upon the obligation resting upon such officers, arising out of the determination of their powers and duties in respect to such maintenance, and their acceptance of the office, as defined by common law or by statute, or by both. Harris v. Carson, 40 Ill. App. 147 (1891); Hathaway v. Hinton, 46 N. C., 243 (I Jones, Law, 1853); Leoni T'w'p. v. Taylor, 20 Mich. 153 (1888). The work is ministerial in character, and they are responsible for negligent performance. Mason v. Fearson, 50 U. S. 9 How. 248 (1850); County Comm'rs v. Gibson, 36 Md. 229 (1872); Dean v. New Milford Twp., 5 Watts & S. 545 (Pa., 1843); Twp. v. Graver, 125 Pa. 24 (1889). The contrary doctrine was once in force in New York (though now repudiated) as laid down in Bartlett v. Crozier, 17 Johns. 450 (N. Y., 1821), and its effect is traceable in the decisions of some states, as seen in Lynn v. Adams, 2 Ind. 143 (2 Cart., 1850); Dunlap v. Knapp, 14 Oh. St. 64 (1862); McConnell v. Dewey, 5 Neb. 385 (1877); and Worden v. Witt, 4 Idaho, 404 (1895).

INSURANCE—WAIVER OF STIPULATIONS—KNOWLEDGE OF AGENT—In Western Nat'l. Ins. Co. v. Marsh, 125 Pac. Rep. 1094, (Okla., 1912), it was held that when a local agent of a fire insurance company, who has the power to accept a risk and deliver the policy is advised and has full knowledge of the fact that other insurance upon the property is in force, and with that knowledge accepts the premium and delivers the policy, such policy is binding on the company, notwithstanding the fact that it contains a provision prohibiting the existence of concurrent insurance without written consent thereto indorsed on the policy, and also contains a provision that none of the company's officers or agents can waive any of its provisions, except in writing indorsed on the policy. This decision is the first handed down in Oklahoma on an insurance contract entered into since statehood; and in adopting this ruling the court cites in accord authorities from forty-one state jurisdictions. Morgan v. Ins. Co., 130 Mich. 427 (1902); *In re* M. & M. Ins. Co., 97 Minn. 98 (1906); Spaulding v. Ins. Co., 71 N. H. 441 (1902); Farnum v. Ins. Co., 83 Cal. 246 (1890), etc.

This line of cases is flatly *contra* to the rulings of the U. S. Supreme Court, and the Massachusetts and English courts, which hold that parol contemporaneous evidence is inadmissible to contradict or vary the express and unambiguous terms contained in the instrument; the provision (as to non-waiver, and requirement of variation to be indorsed in writing) is reasonable, and constitutes a condition the breach of which will avoid a contract of insurance. Assurance Co. v. Building Assoc., 183 U. S. 308 (1901); Parker v. Ins. Co., 162 Mass. 479 (1895); Kyte v. Assur. Co., 144 Mass. 43 (1887); Weston v. Eames, 1 Taunt, 115 (Eng., 1808).

Most of the state decisions are based upon the grounds: (1) That the companies are bound by the acts and knowledge of the agents, as to conditions existing at the inception of the policy, Ins. Co. v. Yeagley, 163 Iowa, 651; (2) it is a peculiar contract, calling for care on the part of courts to protect the weaker party, Grabbs v. Ins. Co., 125 N. C. 389 (1899); Barnard v. Ins. Co., 38 Mo. App. 106 (1889); (3) prevent a fraud by allowing the company to accept benefits, and thus leading insured to believe he had protection, Young v. Ins. Co., 45 Iowa 377 (1876); Ins Co. v. Jones, 62 Ill. 458 (1872); Ins. Co. v. Yeagley, *supra;* Patten v. Ins. Co., 40 N. H. 375 (1860); Wilkins v. Ins. Co., 43 Minn. 177 (1890); Allen v. Ins. Co., 133 Cal. 29 (1901).

INTERSTATE COMMERCE—ORIGINAL PACKAGE—END OF SHIPMENT—In Shaw v. City of Atlanta, 75 S. E. Rep. 486 (Ga., 1912), it was held that an interstate shipment of intoxicating liquor had arrived, within the meaning of the Wilson Act, where the vendee received delivery orders in exchange for the bill of lading, although the liquor was never removed from the carrier's warehouse. This is a case interpreting the Wilson Act (Act Aug. 8, 1890, c. 728, 26 Stat. 313) which provided that intoxicating liquors shipped in interstate commerce should, upon *arrival* in a state, be subject to the operation of the state laws.

In Rhodes v. Iowa, 170 U. S. 412 (1897), it was held that there was no ar-

rival "until arrival at the point of destination and delivery there to the consignee." Heyman v. Ry., 203 U. S. 270 (1906), refused to decide whether a constructive delivery would constitute an arrival; Adams Express Co. v. Ky., 206 U. S. 133 (1906), said: "That the agent (of the carrier) consented to hold the whiskey (for a time) did not destroy the character of the transaction as one of interstate commerce;" Louisville, etc. R. R. v. Cook Co., 223 U. S. 70 (1911), held that the Wilson Act does not apply before actual delivery to the consignee, and the court cited the foregoing cases. The result of these decisions indicates that actual delivery to the consignee is necessary to constitute an arrival.

The courts of Maine hold that the liquor has arrived if it has been delivered, actually or constructively. State v. Intoxicating Liquors, 106 Me. 138 (1909); State v. Parshley, 108 Me. 410 (1911); State v. Intoxicating Liquors, 102 Me. 385 (1907), overruling State v. Intoxicating Liquors, 95 Me. 140 (1901), which held that the liquor had arrived when the carrier placed it in its warehouse. The ruling of the principal case is in accord with these decisions, as is State v. 18 Casks of Beer, 24 Okla. 786 (1909). It is to be mentioned that the latter case refused to follow the rule laid down in the criminal courts of that state, *viz.*: that the interstate commerce does not cease until the liquor is actually delivered at the home of the person entitled to receive it. High v. State, 2 Okla. Cr. Rep. 161 (1909); McCord v. State, 2 Okla. Cr. Rep. 214 (1909). In each case the vendee took actual possession at the carrier's depot and the seizure which was held unlawful occurred while the liquor was being conveyed in a wagon to vendee's residence.

MASTER AND SERVANT—ASSUMPTION OF RISK—In Dailey v. Swift, 84 Atl. Rep. 603 (Vt., 1912), it was held that a servant engaged to ice cars from a high platform did not, as a matter of law, assume the risk of injury because of the lack of a railing on the platform, where the master's foreman, upon the servant's objection to working in such a place, assured him that if anything happened it would be made right.

This is an exception to the general rule, which is well settled both in England and in this country, that an employee assumes all the ordinary and usual risks and perils incident to his employment. Seymour v. Maddox, 16 J. B. 326 (1851); Clarke v. Holmes, 7 H. & N. 937 (1862); Priestley v. Fowler, 3 M. & W. 1 (1837); The Serapis, 51 Fed. Rep. 91 (1892); Narramore v. Cleveland, etc. R. Co., 96 Fed. Rep. 298 (1899); St. Louis Cordage Co. v. Miller, 126 Fed. 495 (1903). He assumes such extraordinary risks as he knows and comprehends, or are so plainly observable that he will be taken to have known and comprehended them. Ogden v. Rummens, 3 F. & F. 751 (1863); Tuttle v. Detroit, etc. R. Co., 122 U. S. 189 (1886); Boyle v. N. Y., etc., R. Co., 151 Mass. 102 (1890); Northern Pacific R. Co. v. Babcock, 154 U. S. 190 (1893).

The law of the principal case, however, is in accord with the weight of authority. Where the master, or the servant acting in his place, promises to remedy the defect complained of, the servant by continuing in his employment for a reasonable time thereafter does not assume the risk of injury from the defect, unless the danger was so imminent that no prudent person would encounter it. Ill. Steel Co. v. Mann, 100 Ill. App. 367 (1897); Morden Frog & Cross Works v. Fries, 228 Ill. 246 (1907); Greene v. Minneapolis & St. L. Ry. Co., 31 Minn. 248 (1883); Schlitz v. Pabst Brewing Co., 57 Minn. 303 (1894); Webster v. Coal Co., 201 Pa. 278 (1902); Rice v. Eureka Co., 174 N. Y. 385 (1903); Dowd v. Erie R. R., 70 N. J. L. 451 (1904); Hough v. R. Co., 100 U. S. 213 (1879); District of Columbia v. McElligott, 117 U. S. 621 (1886); Clarke v. Holmes, *supra*. It is necessary that the promise made by the master should have been the cause which induced the servant to continue in his employment. Eureka Co. v. Bass, 81 Ala. 200 (1886); Clarke v. Holmes, *supra*.

There is a difference of opinion as to what is a "reasonable time" within which the servant may continue to work under conditions known by him to be defective, without being said to have assumed the risk. It is said to be such time as is reasonably sufficient to enable the master to remedy the defect, Ill. Steel Co. v. Mann, *supra;* to last until it is manifest that the promise will not be kept, Hough v. R. Co., *supra*. The question is one for the jury under all cir-

cumstances unless it be clear that the time has been unreasonable, Harrison v. Collins, 25 R. I. 489 (1903).

NEGOTIABLE INSTRUMENTS—FORGED CHECK—A bank cashed a check on another bank and then indorsing it had it pressented to the drawee bank which paid it. In an action by the drawee bank to recover the money so paid, on the ground that the signature of the maker was a forgery, it was held that under the Negotiable Instruments Law, the drawee bank could not recover the money. Cherokee Nat. Bank v. Union Trust Co., 125 Pac. Rep. 464 (Okla., 1912).

A bank is presumed to know the signatures of its depositors, and it pays forged checks at its peril. Hardy v. Chesapeake Bank, 51 Md. 562 (1879); Frank v. Chemical Bank, 84 N. Y. 209 (1879). It cannot recover the amount paid from the person to whom it has been paid, if he was a *bona fide* holder of the check, First Nat. Bank v. Marshaltown, 107 Iowa, 327 (1899); Trust Co. v. Hamilton Bank, 112 N. Y. Suppl. 84 (1908); *contra:* First Nat. Bank v. Wyndmere, 15 N. Dak. 299 (1906); unless by bad faith or misconduct he contributed to the success of the fraud or to the mistake under which the payment was made. Nat. Bank v. Bangs, 106 Mass. 441 (1871); First Nat. Bank v. Richer, 71 Ill. 439 (1874). If the payee takes the check under suspicious circumstances without proper precautions, or his conduct has been such as to mislead the drawee, recovery may be had from him. Rouvant v. San Antonio Bank, 63 Tex. 610 (1885).

The rule that the drawee bank pays at its peril a bill on which the drawer's signature is forged was established in Price v. Neal, 3 Burr, 1354 (1762). Although this decision has been criticised by text-writers, it is firmly established in England and America, and is based on the law that as between parties equally innocent the loss must remain where the course of business has placed it.

ORPHANS' COURT JURISDICTION—TITLE TO PERSONALTY—In William's Estate, 236 Pa. 259 (1912), it was held that the Orphans' Court may issue a preventative decree in the nature of an injunction in order to maintain the *status quo* for the protection and preservation of property claimed by the estate of the decedent, the ownership of which is in dispute.

Originally, the Orphans' Court had little position or power and its decrees carried little weight, Messinger v. Kintner, 4 Binney 97 (1811), so that it is now conceded to be a court of special jurisdiction with its powers derived entirely from statute. Kidder's Estate, 1 Kulp 412 (1875). It is a court of Chancery within the sphere of its limited jurisdiction, Commonwealth v. Judges of Common Pleas, 4 Pa. 301 (1846), but in respect to the property under its control, such court has full and exclusive power. Johnson's Appeal, 114 Pa. 132 (1886). It has exclusive jurisdiction to make and enforce a distribution of a decedent's estate. Musselman's Appeal, 65 Pa. 480 (1870).

Whether the Orphans' Court has authority to determine disputed questions of title may well be doubted, yet it is undoubtedly true that it has jurisdiction and control over assets which admittedly belong to the estate of the decedent. Odd Fellow's Savings Bank Appeal, 123 Pa. 356 (1888). This is so even where the assets of the estate are held by one whose title is only colorable. Marshall's Estate, 138 Pa. 285 (1890); Watt's Estate, 158 Pa. 1 (1893). In these instances there was no dispute that the title to the property was not in the decedent's estate. But where the dispute be a substantial one, until a common law court, through a jury, shall have decided against the adverse claimant in an action to which he has been a party, the latter may set at defiance any order or decree of the Orphans' Court affecting the title. The mere fact that the Orphans' Court would be powerless to reach any result in such case is sufficient to defeat a claim of jurisdiction by way of implication. Cutler's Estate, 225 Pa. 167 (1909).

It had been judicially determined in Paxton's Estate, 225 Pa. 204 (1909), that the assets in the principal case belonged to the decedent's estate, but the property had then been transferred to third parties who had a *bona fide* claim of title. Creditors of the estate then filed a petition to have the assets in question re-assigned until there was a final adjudication of the estate. Though there was no decision as to the ownership of the assets, the court decreed that the re-

transfer be made. This seems an extension of jurisdiction which the Orphans' Court never before made.

PROCEDURE—WRIT OF PROHIBITION—A refusal to allow a bill of exceptions is reviewable by a higher court where the exceptions were taken to a refusal to issue a writ of prohibition. The decision is put upon the ground that a writ of prohibition is not purely a discretionary writ but is sometimes a matter of right. Curtis v. Cornish, 84 Atl. Rep. 799 (Me., 1912).

Where a court has clearly no jurisdiction and the defendant has objected at the outset and has no other plain, speedy and adequate remedy in the ordinary course of the law, he is entitled to a writ of prohibition as a matter of right, and a refusal to grant it may be reviewed on error. Smith v. Whitney, 116 U. S. 173 (1885); Weston v. Charleston, 27 U. S. 449 (1829); Foster v. Foster, 4 B. & S. 187 (Queen's Bench, Eng., 1863); Worthington v. Jeffres, L. R. 10 C. P. 379 (Eng., 1875).

Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or where the petitioner has no other adequate remedy, the writ is a matter of right; but where there is another adequate remedy, by appeal or otherwise, or where the question of the jurisdiction is doubtful or depends on facts which are not made part of the record, or where the application is made by a stranger, then the granting or refusal of the writ is discretionary. *In re* Cooper, 143 U. S. 472 (1891); *In re* Rice, 155 U. S. 396 (1894); *In re* Alix, 166 U. S. 136 (1896).

PROPERTY—RIGHT OF OWNER TO PERCOLATING WATERS—The case of Garns v. Rollins, 125 Pac. Rep. 867 (Utah, 1912), discusses favorably the tendency of the decisions of the last two decades to get away from the common law rule as to percolating waters, or those found beneath land surface not flowing in a defined or known course. At the common law a land-owner had the absolute right to take such waters, without regard to the consequences of such taking upon contiguous property, the damage resulting therefrom not being the subject of legal redress. Gould on Waters, § 280; Chasemore v. Richards, 2 Hurlst. & N. 168 (Eng., 1859); Acton v. Blundell, 12 M. & W. 324 (Eng., 1843) Wheatley v. Baugh, 25 Pa. 528 (1855); Frazier v. Brown, 12 Oh. St. 294 (1861); Delhi v. Youmans, 50 Barb. 316 (N. Y., 1867). Even though the water taken be wasted out of malice, Huber v. Merkel, 117 Wis. 355 (1903).

But in Smith v. City of Brooklyn, 18 App. Div. 340 (N. Y., 1897) recovery was allowed for drying up of a pond due to the abstraction of large volumes of water on adjacent land; and in Forbell v. N. Y., 164 N. Y. 522 (1900), where the city installed huge pumping wells, and by collecting the water prevented its return to the land, so that an adjoining owner's land was rendered too dry for agricultural purposes, the rule was laid down that such was actionable injury; that the adjacent owner would be protected in his supply of water for a reasonable use on the land. This is known as the "American" or "reasonable use" rule, and as said in Peoples v. Carbonic Co., 196 N. Y. 421 (1909), obviously resulted from a consideration of differing conditions of the age and of the possibilities of an unlimited and destructive use of modern engineering methods. That the new rule is gaining ground rapidly is shown in Katz v. Wilkishaw, 141 Cal. 116 (1903), and five subsequent California cases; also in Water Co. v. Farmer, 89 Minn. 58 (1903); R. R. v. East, 98 Tex. 146 (1904); Pence v. Carney, 58 W. Va. 296 (1905); Erickson v. Power Co., 105 Minn. 182 (1908); and Long v. R. R., 32 Ky. L. R. 774 (1909). Two jurisdictions have, however, flatly refused to accept the "reasonable use" rule. Meeker v. City of East Orange, 70 Atl. Rep. 360 (N. J., 1908); and Stoner v. Patten, 132 Ga. 178 (1909).

TORTS—NEGLIGENCE OF QUASI-JUDICIAL OFFICIAL—LIABILITY—The plaintiff had contracted to have a third person cut and haul the timber on a certain tract of land at a certain price per 1000 feet. The defendant, having been selected as "sworn surveyor," greatly over-estimated the amount so cut and hauled, and the plaintiff brought suit to recover as damages the amount unduly paid because of the defendant's overstatement. It was held that a timber surveyo

is a quasi-judicial officer who is not liable for negligence, but would be liable if he acted unfairly or fraudulently. Hutchins v. Merrill, 84 Atl. Rep. 412 (Maine, 1912).

A judge is not civilly liable for acts done in a judicial capacity, even though malicious or corrupt, except in cases of courts of inferior jurisdiction in the clear absence of all jurisdiction. Bradley v. Fisher, 80 U. S. 335 (1871); Yates v. Lansing, 5 Johns 282 (N. Y., 1810); Phelps v. Sill, 1 Day 315 (Conn., 1804); Prat v. Gardner, 2 Cush. 63 (Mass., 1848).

An arbitrator is a quasi-judicial officer exercising judicial functions, Hoosac Tunnel Co. v. O'Brien, 137 Mass. 424 (1884), chosen by the parties themselves, Garr v. Gomez, 9 Wend. 649 (N. Y., 1832). One who fixes the value of certain property by examination only is not an arbitrator. Turner v. Goulden, L. R. 9 C. P. 57 (Eng., 1873). But if the task involves peculiar skill or knowledge, Chambers v. Goldthorpe, (1901) 1 K. B. 624 (C. A., Eng.), or the hearing of evidence and the weighing of details, *in re* Hopper, L. R. 4 Q. B. 372 (Eng., 1867), the person is an arbitrator.

Like other officers exercising judicial functions, an arbitrator is not liable for error, mistake, ignorance, negligence, or want of skill or care. Tharsis Co. v. Loftus, L. R. 8 C. P. 1 (Eng., 1872); Stevenson v. Watson, L. R. 4 C. P. 148 (Eng., 1879); Chambers v. Goldthorpe, *supra;* Seaman v. Patten, 2 Caines 312 (N. Y., 1805); Phelps v. Dolan, 75 Ill. 90 (1874). He is protected if the act be within his "jurisdiction." Fath v. Koeppel, 72 Wis. 289 (1888). He is not liable even for fraud or collusion, Jones v. Brown, 54 Iowa 74 (1880); Hoosac Tunnel Co. v. O'Brien, *supra;* but compare Ludbrook v. Barrett, 36 L. T. (N. S.) 616 (1877) and dicta in leading case, in Stevenson v. Watson, *supra*, and in Seaman v. Patten, *supra*, which impose liability.

TORTS—POLLUTION OF PERCOLATING WATERS—Oil from a leak in an oil pipe on the defendant's land polluted the percolating water and rendered the well of the plaintiff unfit for use. The injury was of a temporary character. *Held:* the defendant was liable for the injury, without negligence on his part being proved. Texas Co. v. Giddings, 148 S. W. Rep. 1142 (Tex., 1912).

Upon the principle that a land-owner has the right to appropriate all the water under his land not flowing in marked channels, it has been held he has the right to deprive others of the use of that water by contamination, where it was done without negligence or malice. The jurisdictions which conform to this rule require negligence or malice to be proved, before recovery may be had for contaminating percolating waters. Dillon v. Acme Oil Co., 49 Hun. 565 (N. Y., 1888). Long v. L. & N. R. R., 128 Ky. 26 (1908). In one or two jurisdictions, the land-owner's right to appropriate or pollute percolating waters is absolute and no recovery may be had. Upjohn v. Richland Board of Trade, 9 N. W. Rep. 845 (Mich., 1881); Greencastle v. Haglett, 23 Md. 186 (1865).

In the great majority of American jurisdictions, pollution of percolating waters is actionable *per se.* Pensacola v. Pebley, 25 Fla. 381 (1889); Illip v. School Directors, 45 Ill. App. 419 (1892). The pollution is "an abiding nuisance" so no negligence need be proved.

TORTS—PROXIMATE CAUSE—FIRES—In Hardy v. Hines Bros. Lumber Co., 75 S. E. Rep. 855 (N. C., 1912), it was held that the identity of a fire set by the defendant, as the proximate cause of the burning of the plaintiff's property, was not lost because it died down and for several days smoldered in stumps and other combustible material, if it finally revived and broke out afresh by reason of contact with dry leaves, and spread to the plaintiff's property. The intervention of a considerable time and space may be considered by the jury on the question of proximate cause, but it is not controlling.

Similarly, in Haverly v. Railroad Co., 135 Pa. 50 (1890), it was held that pauses in the progress of the fire, and the lapse of time, while matters for the consideration of the jury in determining the continuity of effect, do not enable the court to say, as matter of law, that the causal connection between the railroad company's negligence and the injury to the plaintiff was broken. The fire in this case, as in the principal case, had been thought extinguished, but nineteen

hours afterward a wind arising caused it to spread and destroy the plaintiff's lumber.

The doctrine of the principal case is in accord with the prevailing view in England and in most of the American states. Smith v. London, etc., R. Co., L. R. 5 C. P. 98 (Eng., 1870); Kellogg v. St. Paul, etc., R. Co., 94 U. S. 469 (1876); Grand Trunk R. Co. v. Richardson, 91 U. S. 454 (1875); Perley v. Eastern R. Co., 98 Mass. 414 (1868); Kellogg v. Chicago, etc., R. Co., 26 Wis. 223 (1870); Annapolis, etc., R. Co. v. Gantt, 39 Md. 115 (1873); Fent v. Toledo, etc., R. Co., 59 Ill. 349 (1871); Poeppers v. Mo., K. & T. R. Co., 67 Mo. 715 (1878); Cleveland v. Grand Trunk R. Co., 42 Vt. 449 (1869); Black v. Railroad, 115 N. C. 667 (1894); and Phillips v. R. Co., 138 N. C. 12 (1905). Proximity of cause has no necessary connection with contiguity of space or nearness in time. Cooley on Torts, p. 67.

A contrary doctrine is laid down in the cases of Ryan v. N. Y. Cent. R. Co., 35 N. Y. 210 (1866), and Penna. R. Co. v. Kerr, 62 Pa. 353 (1869), where it was held that a railroad company is not liable to the owner of a house consumed by fire communicated from another house situated at a considerable distance from it, and which was set on fire by a spark from the locomotive of the company. In Fent v. Toledo, etc., R. Co., *supra*, C. J. Lawrence said these two cases stand alone, and are in direct conflict with every English or American case, as yet reported, involving the question. In Frace v. N. Y., etc., R. Co., 143 N. Y. 182 (1894), the court said that the Ryan case should not be extended beyond the precise facts which appear therein; and the weight of the Kerr case as a precedent was somewhat diminished by Oil Creek, etc., R. Co. v. Keighron, 74 Pa. 316 (1873), and Penna. R. Co. v. Hope, 80 Pa. 373 (1876).

TORTS—SERVANT—EMERGENCY—A small boy who acted as helper of defendant's servant on a milk route was injured by a fall from the wagon. Having assisted the servant to place the boy in the wagon, the plaintiff, at the servant's invitation, was getting into the wagon to aid in carrying the boy home, when the servant negligently started the horses, throwing out the plaintiff and injuring her. It was held that the servant, not having been employed to decide his master's liability in such cases, had no authority in law, even in an emergency, to invite the plaitiff to enter the defendant's wagon and that therefore no duty which the defendant owed to plaintiff had been violated. Houghton v. Pilkington, (1912) 3 K. B. 308 (Eng.).

This decision is in accord with the general trend of the authorities. It follows Cox v. Midland Ry. Co., 3 Exch. 268 (1849) where the authority of a station master to bind the railway for the payment of a surgeon summoned in an emergency was denied. *Contra*, Louisville, etc., Ry. v. Smith, 121 Ind. 353 (1889) where a conductor was held to have authority to bind the railroad for the payment of fees for surgeons to the extent of the agency, but no further. The manager of a property has no implied power to bind the owners by a loan, even if such loan is made solely to prevent the judicial seizure of the property. Hawtayne v. Bourne, 7 M. & W. 595 (Eng., 1841).

Even in cases of emergency, the general rule is that one who voluntarily or at the request of a servant goes to the assistance of such servant, is a fellow-servant of the latter and cannot recover for injuries due to another servant's negligence. Osborne v. Knox, 68 Me. 49 (1877); Longa v. Stanley Co., 69 N. J. L. 31 (1903); Cannon v. Fargo, 138 N. Y. App. 20 (1910); Gunderson v. Brewing Co., 71 Misc. N. Y. 519 (1911); Wischam v. Rickards, 136 Pa. 109 (1890); Degg v. Midland Ry. Co., 26 L. J. Exch. 171 (Eng., 1857). But in some jurisdictions if the emergency be sufficiently great, Corkey Co. v. Bueherer, 84 Ill. App. 635 (1899), certain servants have in law authority to employ any suitable person for injury to whom, for the negligence of a servant, the master is liable. Railroad v. Givley, 100 Tenn. 472 (1897); Sloan v. Cent. Ry. Co., 62 Iowa, 728 (1883). The doctrine of *respondeat superior* then applies. Ry. Co. v. Bolton, 43 Ohio St. 224 (1885).

TRADE UNIONS—RESTRAINT OF TRADE—Because of a statutory provision against recovery of benefits from a trade union paid out of trade funds, recovery

was refused a widow who sued for sums due her deceased husband, a member of the defendant organization, a registered trade union with which he had insured for many years Russell v. Amalgamated Society, 81 L. J. 619 (K. B., 1912).

Prior to the Act of 1871, 34 & 35 Vict., c. 31, trade unions in England were incorporated societies, not recognized as legal, and illegal in that they restrained trade and were contrary to public policy. Hornby v. Close, (1867) 2 Q. B. 153. By that Act, Sec. 3, agreements made by a trade union were declared not void or voidable because of the illegal character of the association. Sec. 4, provided that an action could not be sustained against a trade union (*inter alia*) (3) (a) on an agreement to pay out of trade funds benefits to members. Provision was also made for the registration of the unions which enabled them to hold property, and to sue or be sued in their registered name.

Since the Act, in a few cases, recovery has been had where the trade union was sued for sick benefits to members, for the reason that, if the rules of the association were of such a character that the association was not an organization in restraint of trade, then it became legal, and quite apart from the Trade Union Act of 1871 a common law action survived. Osborne v. Amalgamated Society of Railway Servants, (1911) 1 Ch. 540; Gozney v. Bristol Trade and Provident Society, (1909) 1 K. B. 901; Swaine v. Wilson, (1889) 24 Q. B. D. 252. In the last mentioned case, the fact that some of the rules of the union were illegal was not thought sufficient to make the association illegal.

In the principal case the court refused to consider this last argument and relied entirely on the statutory prohibition for its decision.

In America, contrary to the English rule, trade unions have been regarded as lawful and commendable and as having the same legal footing as other social organizations. *In re* Higgins, 27 Fed. 443 (1886). And the mere presence of some objectionable features in the constitution of the trade union will not render the whole organization unlawful. Tracy v. Barker, 46 N. E. Rep. 38. In general, the tendency has been to attempt to except trade unions by statute from liability for restraint of trade, though such statutes are usually declared unconstitutional, as in Chicago, W. & V. Coal Co. v. People, 114 Ill. App. 75 (1904).

TRIAL BY JURY—PROCEEDINGS TO REGISTER TITLE UNDER THE TORRENS LAW—An application was made, under a Land Registration Act, commonly known as the Torrens Law (Rev. Laws of Minn., 1905, secs. 3370–3451) to register a title to land, which the applicant claimed to have acquired by adverse possession. This was granted. A demand for a jury trial, however, was refused on the ground that the proceeding was one to register title and not "an action for the recovery of . . . specific real . . . property" to which a jury trial was guaranteed by the constitution of the state. *In re* Peters, 137 N. W. Rep. 390 (Minn., 1912).

This was a proceeding to clear up title to land; it was therefore equitable in its nature and triable by the court and not by a jury. Johnson v. Peterson, 90 Minn. 503 (1903). But as title necessarily carries with it the ultimate right of possession, the provision of the Massachusetts constitution that there should be a right to trial by jury "in all controversies concerning property" was held to guarantee a jury trial in such proceedings in that state. Weeks v. Brooks, 205 Mass. 458 (1910).

Constitutional provisions to the effect that the right to trial by jury shall remain inviolate are construed as meaning that trial by jury shall remain as it was at common law at the time of the adoption of the constitution. State v. Tresher Co., 40 Minn. 216 (1889). Not the form of the action, but the nature of the cause of action is the criterion; a jury trial is a matter of right in all controversies fit to be tried by a jury, according to the rules of the common law, notwithstanding the fact that the right for the violation of which the action is brought did not exist at common law, but was created by statute subsequently to the adoption of the constitution. Plimpton v. Somerset, 33 Vt. 283 (1860). But where a remedy is created by statute for an injury never redressable at common law, no common law right to a jury trial accompanies it. *In re* Penna. Hall, 5 Pa. 204 (1847).

WORKMEN'S COMPENSATION—INABILITY TO GET EMPLOYMENT—In Ball v. Hunt and Sons, 81 L. J. 782 (H. L., 1912), it was held that inability to obtain employment resulting from a disfiguring accident was an element to be taken into consideration in assessing compensation under the Workmen's Compensation Act, 1906; that the words "incapacity for work" ought not to be limited to mere loss of physical power, but include an inability to find employment as a workman resulting from the injury.

This is in accord with the trend of decided cases in England upon this subject. Clark v. Gas Light & Coke Co., 21 Times L. R. 184 (C. of App., 1905); Radcliffe v. Pacific Steam Navigation Co., 79 L. J. K. B. 429 (1910); Proctor & Sons v. Robinson, 81 L. J. 641 (1911). The case of Cardiff Corporation v. Hall 81 L. J. 644 (C. of App., 1911) is not in conflict, for in that case there was evidence of ability to earn, qualified only by some evidence of difficulty in getting employment, which was not connected with the fact of personal disqualification resulting from the injury.

The Scottish decisions are not in accord with the doctrine. The case of Boag v. Lockwood Colliers, Lim., (1910) S. C. 51, is a broad affirmance of the proposition that incapacity under the act must be limited to physical incapacity and that alone. This case was followed by the recent case of McDonald or Duris v. Wilsons & Clyde Coal Co., 81 L. J. P. C. 188 (1911), which case, however, was treated as being governed by the decision in Boag's case.

A workman, the courts have held, is not entitled to compensation for unemployment due to the slackness of trade, or, to use the language of the Master of the Rolls in Dobby v. Wilson, Pease & Co., 2 B. W. C. C. 370 (1909), "the employer does not guarantee the state of the labor market."